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## STUDIES IN ENGLISH CIVIL PROCEDURE.\*

### II. THE RULE-MAKING AUTHORITY.

#### VIII.

As compared with the Rules of 1875, the physical bulk of the new Rules was their first attribute to draw the attention. Together with the twelve sets of amending Rules launched between 1875 and 1883, the old Rules amounted to less than six hundred in number; the new came up to the imposing total of eleven hundred, divided into seventy-two Orders, as against the sixty-three Orders of old. But the fear that such an increase was oppressive was soon dispelled when it was discovered that nearly four hundred of the Rules were transcriptions from previously scattered statutes and regulations, so that there had been completed a true code of procedure. In fact, the Rule Committee had consolidated over eighteen hundred scattered sections of statutes and rules into a fairly compact and logical arrangement,<sup>251</sup> and the Statute Law Revision Act in 1883 completed the work by repealing practically all old procedural legislation rendered obsolete by the new code.<sup>252</sup> Roughly one-half of the new Rules are reproductions, with or without alterations, of Rules in the Schedule of 1875 or its amendments;<sup>253</sup> the other half are principally devoted to replacing statutory rules, and only about one-sixth of the whole are absolutely new.<sup>254</sup>

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\*Continued from the February issue. 63 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 304.

<sup>251</sup>As stated by Mr. James (now Viscount) Bryce, in the debate in the House of Commons.

<sup>252</sup>The full text of the Rules of 1883 can best be consulted in Wilson: Judicature Acts and Rules (4th ed., London, 1883). A few subjects were omitted both from the repealing acts and from the new Rules, whether by intention or inadvertence does not seem clear. They include the Rules made under the Companies Acts, 1862 to 1867; the Liquidation Act, 1868; the Debtors Act, 1869; the Settled Land Act, 1882, and the Conveyancing Act, 1882. The full list is given in F. R. Parker: Analytical Index of the Judicature Acts and Rules (London, 1883), p. v of introduction.

<sup>253</sup>Five hundred and forty-two out of the whole eleven hundred. Of the old Rules, one hundred and eighty-nine are reproduced *ipsissimis verbis*, two hundred and thirty-three slightly altered and one hundred and twenty materially altered. Thirty-seven are omitted.

<sup>254</sup>Three hundred and ninety-four of the new Rules derive from old statutes or regulations. Of these twenty-eight are reproduced *ipsissimis*

In general arrangement the new Rules correspond closely to the old; wherever possible the Order numbers were retained, so as to create the least inconvenience, and the new matter was introduced largely by increasing the length of Orders here and there throughout the Schedule rather than by merely adding it in separate Orders at the end. In this manner, despite their tripartite origin, the Rules remained in their familiar form, and practitioners could, without deep research, turn with reasonable confidence to the part of the book in which they needed to look for any particular Rule.

The new matter in the Rules, though scattered all through them according to its place in the chronological sequence of the Orders, falls into two classes, of which the first consists of Rules imported from statutes and regulations almost unchanged, to consolidate the law, and the second of Rules which effect material alterations or introduce entirely new ideas in the court's procedure.<sup>255</sup> Most of the former are drawn from the Chancery Amendment Acts and the Consolidated Chancery Orders of 1860, as the framers of the 1875 Schedule had been satisfied to let the old chancery practice remain pretty much as it was before.<sup>256</sup> Thus regulations were introduced affecting investment of funds in court, suits *in forma pauperis*, the administration and execution of trusts, the taking of accounts, the use and making of affidavits, the examination of witnesses out of court and the perpetuation of testimony, the appointment of receivers and the use of equitable execution, sales of property by the court, the conduct of matters in chambers, the duties of clerks and registrars, and other items of what had been exclusively chancery business. Another important subject upon which a considerable body of Rules was added was that of costs; these come prin-

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*verbis*, two hundred and eighty-three slightly altered and eighty-three materially altered. The remaining one hundred and sixty-four Rules contain the provisions altogether new.

<sup>255</sup> Three hundred and eleven Rules belong in the first class, three hundred and sixty-seven Rules in the second. A detailed analysis showing the source of each of the eleven hundred new Rules, and the disposition made of the old Rules and statutes drawn from, will be found in Parker, *op. cit.*

<sup>256</sup> Twenty-two of the Consolidated Orders were drawn upon for Rules, especially Order I, from which twenty-six, Order XXXV, from which forty-eight, and Order XL, from which nineteen, were taken.

pally from a special Order on costs issued as an amendment to the 1875 Schedule, but also from old rules on both sides of the court. Admiralty rules form another important addition, as do rules on interpleader proceedings. There are many minor additions, as there were twelve statutes and fourteen different sets of rules drawn upon in all, apart from the 1875 Schedule itself.<sup>257</sup>

But the three hundred and sixty-seven Rules which represent the distinctively new element in procedure are the ones that contain the most interest. These are the kernel of the reforms introduced into the Judicature Rules by Lord Selborne<sup>258</sup> and are the fruit of the recommendations made by his Legal Procedure Committee in 1881. Other influences that helped to develop them were the Law Society's Report upon the Legal Procedure Committee's work, a large number of decisions in the Court of Appeal interpreting doubtful sections in the Schedule of 1875, and, not least, the discussions of the Rule Committee itself, aided by the Lord Chancellor's constant and personal co-operation.<sup>259</sup>

As described above, pleading was the first large problem the Committee tackled and its solution was to command that all pleadings should be more concise and that the parties might, if they chose, or must, in certain cases at a master's order, dispense with pleadings altogether. A complete set of forms was provided in the new Appendices to guide the pleader in the way he

<sup>257</sup> The full list (given in Parker, *op. cit.*) includes the 11 Henry VII, c. 12 (one Rule), 9 & 10 Will. III, c. 15 (one Rule), 1 Will. IV, c. 22 (three Rules), 1 & 2 Will. IV, c. 58 (three Rules), 5 & 6 Vict., c. 69 (two Rules), 15 & 16 Vict., c. 76 (twelve Rules), c. 80 (twelve Rules), c. 86 (nineteen Rules), 16 & 17 Vict., c. 78 (one Rule), 17 & 18 Vict., c. 128 (fifteen Rules), 23 & 24 Vict., c. 126 (seven Rules), 24 & 25 Vict., c. 10 (one Rule), the Reg. Gen. of Hilary Term, 1853 (twenty-nine Rules), the Reg. Gen. of Trinity Term, 1853 (five Rules), the Chanc. Reg., 1857 (fifteen Rules), the Admiralty Rules, 1859 (fifty-one Rules), the Consolidated Orders of the Court of Chancery, 1860 (one hundred and eighty-nine Rules), the Chancery Order of March 20, 1860 (four Rules), of February 1, 1861 (two Rules), of February 5, 1861 (two Rules), of November, 1862 (one Rule), of 1865 (ten Rules), the Reg. Gen. of June 6, 1867 (one Rule), of Michaelmas Term, 1869 (six Rules), the Chancery Order of January 7, 1870 (one Rule), and the Admiralty Rules of 1871 (one Rule).

<sup>258</sup> An analysis of these, with similar provisions in the old practice in parallel columns, by John Eldon (now Mr. Justice) Banks, appeared in 75 LAW TIMES, pp. 288, 300, 313, 328, 341, 352, 364, 375, 392, 403, 404, 420 and 422.

<sup>259</sup> One gathers, from the reminiscences of contemporaries, that these were not dull, as the Committee was fairly divided in its habits of thought.

should go, and it is there that the changes called for are most clearly indicated. On the whole, competent critics declared that the effect was to return to a system very much like that in use under the Common Law Procedure Acts, but there is no doubt that the device of requiring conformity to the official forms was a longer step towards bringing pleading up to the standard of the Judicature Act ideal than anything that had been tried before. Comment on the forms themselves, *qua* forms, has always been divided in tone. A contemporary critic said:<sup>260</sup>

"The forms of pleading must be considered as much superior to those which they supersede. . . . With these models before his eyes no one who understands his profession, and who is instructed with reasonable care, can fail to state with clearness the nature of the case."

On the other hand, a somewhat reactionary article in the Encyclopaedia Britannica<sup>261</sup> which attacks the Rules as a whole declares: "It is true that these forms do not display a high degree of excellence in draftsmanship," and one of the present King's Bench masters whose opinion on matters of procedure is in the highest degree expert testified before the recent Royal Commission on Delay in the King's Bench Division that "one of the great difficulties that one has to deal with in dealing with the pleadings is that the Rules are altogether inconsistent with the forms. . . . The Rules say one thing and the forms say another."<sup>262</sup>

Whether precise or not, however, the forms indicated the changes the committee wished made, and in that purpose they were successful. In the new pleading, moreover, precision of form has lost its former glory completely and been forgotten together with the time when "the form was preferred to the sub-

Lord Coleridge and Lord Justice Lindley were the keenest advocates of new provisions; Sir James Hannen and Mr. Justice Manisty, opposed to violent changes, exercised an influence for restraint and accuracy.

<sup>260</sup> 27 SOLICITORS' JOURNAL, 611 (July 14, 1883).

<sup>261</sup> 11th ed., vol. 15, p. 541, tit. "Judicature Acts." Written in 1902 for the Supplement to the 9th ed. by Lord Davey, then a member of the Judicial Committee of the Privy Council.

<sup>262</sup> Master T. Willes Chitty. "Minutes of Evidence taken before the Commission" (Parl. Paper Cd. 6762, 1913), vol. I, p. 23.

stance, the statement to the thing stated.”<sup>263</sup> Two innovations made in 1883 finally disposed of its ancient high estate. One is the brief Rule that “No technical objection shall be raised to any pleading on the ground of any alleged want of form,”<sup>264</sup> and the other is the abolition of demurrers. This last was the most important reform introduced by the Rule Committee on its own initiative and was its strongest blow against the hateful rule of technicality. Under the court’s new liberality in allowing amendments, the use of demurrers had, it is true, degenerated into a sort of rapier play by which a party would drive his opponent to amend a pleading without really affecting the result of the action. They were principally useful for their annoyance and their cost. “No instrument was better adapted for deciding a genuine point of law, fairly raised on the pleadings, and going to the substance of the case; but it was so seldom that these conditions were all combined, that proceedings on demurrer were more often than not a vexation to those who had to argue them, and a useless increase of costs. It must be said, indeed, that the prejudice against demurrers was so great upon the bench, that they did not by any means get fair play; probably a consciousness of the injustice which, in former times, the court had often allowed demurrers to inflict on suitors, united its influence with a daily increasing reluctance to lay down strict legal principles, in bringing them into disfavor.”<sup>265</sup> The consequence was that the whole tradition of arguments on demurrer was shaken off.

In place of the demurrer (“No demurrer shall be allowed” says the Rule<sup>266</sup> succinctly) the pleader is privileged to raise an “objection in point of law,” which will be disposed of, in the ordinary case, either at or after the trial of the facts, instead of at some time before.<sup>267</sup> In addition, there are powers to have the “point of law” argued before the trial if actually necessary, to make the decision on the argument apply to the whole or only to

<sup>263</sup> Lord Chief Justice Coleridge to the American Bar Association, at New York, October 11, 1883.

<sup>264</sup> Order XIX, Rule 26.

<sup>265</sup> 27 SOLICITORS’ JOURNAL, 692 (August 18, 1883).

<sup>266</sup> Order XXV, Rule 1.

<sup>267</sup> It is open to both parties to raise such an objection.

parts of the claim or defence, and finally, for very clear cases, to order a whole pleading struck out "on the ground that it discloses no reasonable cause of action or answer."<sup>268</sup> It is only in exceptional cases, however, that a point of law will be decided before the facts themselves are heard; the application will be refused "especially if the decision of the question of law will not necessarily dispose of the whole matter."<sup>269</sup> This provides an elastic and comprehensive system under which, with due regard to the actual proved facts of a case, substantial points of law, either small or great, "can still be raised on the pleadings as neatly as and with greater facility than before."<sup>270</sup> The only objection to this improvement came from those to whom the old punctilio and preciseness of common law pleadings was still dear; they bewailed the passing of the old order. "Formerly the pleader had the fear of a demurrer before him," complains Lord Davy;<sup>271</sup> "Nowadays he need not stop to think whether his cause of action or defence will hold water or not, and anything which is not obviously frivolous or vexatious will do by way of pleading for the purpose of the trial and for getting the opposite party into the box."

But such a comment overlooks the new channel through which all actions must flow before reaching trial, the channel which takes them through the masters' chambers under the safe conduct of the summons for directions. The "omnibus summons" proposed by Lord Selborne's Procedure Committee in 1881 has, indeed, found a place in the Rules and by virtue of its authority the master stands as arbiter between the parties and the court. Upon its issue, soon after the defendant has appeared, the action is assigned to one of the masters who thereafter has complete charge of the proceedings up to trial; no step can be taken without his leave, and his decisions clear the air of many matters that might cloud the issues when they come to trial.<sup>272</sup>

<sup>268</sup> Order XXV, Rules 2, 3, 4.

<sup>269</sup> *Per* Lindley, L. J. (who was active in the Rule Committee), in *Cock-sedge v. Metropolitan Coal Co.*, 65 LAW TIMES REPORTS, 432, 434 (1891).

<sup>270</sup> 18 LAW JOURNAL, 409 (July 28, 1883).

<sup>271</sup> Encyclopaedia Britannica, cited *supra*.

<sup>272</sup> Order XXX. The summons for directions was optional in 1883, but has since been made compulsory in all but a very few cases.

His presence is the visible symbol of the control over the course of an action, now lost to the parties themselves, which is exercised by the court.

One of the most useful of his functions is the treatment of claims for which summary judgment may be given; these included liquidated money claims under the old Rules, and in 1883 were extended to cover actions for the ejection of a tenant of real property whose term has expired or been determined by notice to quit.<sup>273</sup> Where the defence is not shown, on affidavit, to go to the merits, final judgment is at once given by the master; wherever there does seem to be a question for trial in such cases it is almost invariably a question of fact, usually as to the amount due, and the master may then admit the defendant to a defence, on proper terms. Under the 1875 Rules, the payment into court of the sum in dispute was the only condition he could impose; the 1883 changes make him free to dictate the time and mode of trial as further conditions to defence.<sup>274</sup> He can put an end to delay by ordering an immediate trial by a judge without a jury, on the writ and affidavit, without further pleadings or interlocutory applications of any sort.<sup>275</sup>

Another matter which is dealt with on the summons for directions, in which changes were introduced in 1883, is the granting of discovery. To administer interrogatories no leave had been necessary under the former Judicature Rules, but the 1883 Rules make the leave of the master prerequisite in all cases except actions involving fraud or breach of trust,<sup>276</sup> and before granting leave the master is required to take into account any offer by the other side to give particulars, make admissions, or produce documents. Then the order for discovery of documents

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<sup>273</sup> Order III, Rule 6. This extension was in response to a request made in the report of the Law Society's committee which reviewed the work of the Legal Procedure Committee.

<sup>274</sup> Order XIV, Rule 6.

<sup>275</sup> To make these cases come to trial without delay a separate list was established in 1893, called the Short Cause List, into which cases may be put which can be tried in a half-hour. This list is taken on Saturday mornings, and frequently judgment will be entered within a fortnight of the defendant's appearance, even though he contests the claim.

<sup>276</sup> Order XXXI, Rule 1. This exception was removed in 1893.

is somewhat modified; although previously granted of course, it is provided that it may be limited to certain classes of documents or to documents affecting only a part of the case, or be refused altogether.<sup>277</sup> Finally, a party seeking either to administer interrogatories or to obtain discovery of documents is required to deposit into court the sum of Five Pounds as an earnest of good faith, to cover the costs, which sum he will be repaid only if it develops that his step in seeking recovery was reasonable.<sup>278</sup> All these restrictions were imposed to carry out the Legal Procedure Committee's recommendation that the right to discovery should be curtailed because it had become a source of needless expense. Besides these limitations a few useful extensions are made in the practice; one is to permit a party to call on his opponent to admit certain facts or bear the costs of having them proved;<sup>279</sup> another is that bankers' and other business books may be inspected at their usual place of custody, instead of at a solicitor's office.<sup>280</sup>

Payment into court is another interlocutory step into which an important change is introduced. Previously such a payment could only be understood as an admission of the claim *pro tanto*, and the claimant was always entitled to go on with the action in an attempt to recover more. The 1883 Rules introduce a new form of payment in, which makes it possible for a defendant, with his defence, to pay money into court "with a denial of liability."<sup>281</sup> The advantage of this is that though it may be less than the plaintiff claims, the plaintiff must, if he accepts the sum and wishes to take the money out of court, accept it in full satisfaction of his claim, and cannot, after taking it out, go on with the action in an attempt to recover more. If, on the other hand, he rejects the sum paid in as insufficient and does not take it out,

<sup>277</sup> Order XXXI, Rule 12. The order for discovery of documents is now, however, practically never refused or limited.

<sup>278</sup> Order XXX, Rule 26. This restriction was removed in 1905, and security for the costs of discovery is now ordered only in exceptional cases.

<sup>279</sup> Order XXXII, Rule 4. This carried out a recommendation, hitherto unnoticed, of the original Judicature Commission of 1869. It is, however, a procedure not frequently resorted to.

<sup>280</sup> Order XXXI, Rule 17. This saves business people much annoyance.

<sup>281</sup> Order XXII, Rules 1 and 6. This was one of the provisions developed out of the decisions in the Court of Appeal.

and then, at the trial, recovers less than that amount, he is liable to pay the defendant's costs. The object of this innovation is to provide a medium of compromise for cases where the defendant is willing to pay something for the sake of peace, rather than incur the expense and risk of proving he is not at fault. In the same Order is included a most beneficent provision that money recovered by or for infants is to be held in court and invested or paid out only as directed by the judge, rather than handed over to the infant's guardian or solicitor.<sup>282</sup>

The Rules on trial and judgment were subjected to some alterations, none of them of a startling nature. Order XXXVI, on mode of trial, was recast so as to make it more evident that trial by a judge alone was considered the form most favored. In actions for slander, libel, or other attacks upon reputation, an absolute right to have a jury as of course is preserved; in all other actions, a special application for a jury must be made. This application will ordinarily be granted except in cases involving prolonged or scientific investigation of facts, accounts, or documents, and for issues which properly belong in the Chancery Division. But the normal mode of trial is that without a jury. A further incentive to the parties to avoid jury trials is the creation of separate lists for the jury and non-jury actions;<sup>283</sup> the latter are always disposed of more quickly than the former, so the court is more approximately abreast of its work in that list, while the jury trials are often weeks behind. As with other parts of the Rules, miscellaneous improvements are effected in minor matters; among others, the master is given jurisdiction to try interpleader issues,<sup>284</sup> which usually arise out of execution on a judgment and ought not to be held up by being set down in a list for trial in court; any trial or appeal judge is authorized himself to inspect any property or thing in dispute;<sup>285</sup> although judgment

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<sup>282</sup> Order XXII, Rule 15. This Rule has since been altered, to make the newly (1906) created Public Trustee the custodian of the fund. Guardians of infants are not required in England to give bond.

<sup>283</sup> This and the other alterations in Order XXXVI were made upon the recommendation of the Legal Procedure Committee.

<sup>284</sup> Order LVII, Rule 8.

<sup>285</sup> Order L, Rule 4, an equivalent of the jury's "view."

is usually entered as of the day when it is pronounced, the court is given power to order that it should be antedated or postdated if necessary,<sup>286</sup> and it is provided that a judgment creditor may issue execution for the amount of his judgment alone without waiving the right to issue a later writ for the amount of his costs.<sup>287</sup> Then there are several changes as to the relation of parties to judgments; new trials may be granted as to some of the parties, while the result as to others is left untouched;<sup>288</sup> if some of several defendants fail to appear, the plaintiff may, if his claim is unliquidated, take interlocutory judgment against those in default and have his damages assessed finally at the trial of the others;<sup>289</sup> and the third party procedure is improved by making it possible to sign judgment in the principal action against the third party, instead of having to sue him in a separate action after his liability has been established.<sup>290</sup>

A most interesting innovation of important consequences and deserving of separate mention is Order XXV Rule 5, which permits the court to make binding declarations of rights, "whether consequential relief is or could be claimed or not." This introduces for the first time the practice of giving decisions on points not actually in litigation. It is limited, however, to cases where the plaintiff has a cause of action, the court awarding merely a declaration asserting his right without awarding damages or an injunction; and it has been held that the declaration claimed must be ancillary to the putting in suit some legal right.<sup>291</sup> Its most useful application is when, in an action against

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<sup>286</sup> Order XLI, Rule 3, a power exercised, for instance, when judgment has been reserved and rights are prejudiced by the delay.

<sup>287</sup> Order XLII, Rule 18. Formerly he had to include costs in the first writ or waive them.

<sup>288</sup> Order XXXIX, Rule 6. The practice on applications for new trials is assimilated to that on appeals. The motion now is to the Court of Appeal, and is usually "for judgment or a new trial."

<sup>289</sup> Order XIII, Rule 6. This Rule supplied an obvious omission in the old Rules on default.

<sup>290</sup> Order XVI, Rule 52. This had been held necessary under the old Rules. The new Rules also clear up a doubt by expressly providing that a defendant may make one of his co-defendants the third party from whom he claims indemnity.

<sup>291</sup> *Per* Collins, M. R., in *Williams v. Collieries* [1904], 2 K. B. 44, 49. The Rule is an extension of the Chancery Amendment Act of 1852 to include future rights.

one member alone of a numerous class, for the infringement of a right they are all violating, a declaration is asked for that the right exists as against them all.

Then costs, the subject which had so agitated the Procedure Committee, was raised to the dignity of one of the largest Orders in the Rules. Instead of a brief four-line Order, leaving all costs to the discretion of the judge, there is now a long Order<sup>292</sup> containing twenty-seven Rules and fifty-eight sub-Rules, collated from the previous Rules issued under the Judicature Act as an amendment to the 1875 Schedule, the Chancery Orders on costs, and the new provisions suggested in the Procedure Committee's Report. The latter are, in the main, the requirement of a uniform scale of costs in all Divisions of the court and the setting out in detail of higher and lower scales of fees to be applied by the taxing masters in allowing costs,—the lower scale to be applied in ordinary cases, the higher in those of unusual difficulty. The drafting of these scales and the adjustment of the charges in their various parts in proportion was considered a work requiring the greatest knowledge of the details of practice, and was entrusted to Richard Bloxam, the old Senior Taxing Master of the day. He worked on these scales under the personal supervision of Lord Selborne, and in the subsequent revision in Committee, Sir George Jessel proved of great service in protecting the interests of solicitors, so that proper provision might be made for their remuneration in every class of work coming into the court. In Rule 27, which is for the guidance of taxing masters, there are a few innovations which it may be of interest to point out: parts of any papers used in the action which the taxing master, in his discretion, considers unnecessary, may be struck out;<sup>293</sup> he is not to allow the costs of more than one extension of time for the doing of any act in the cause, unless such extension was due to

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<sup>292</sup> Order LXV.

<sup>293</sup> Order LXV, Rule 27 (20). Two interesting Rules as to the sufficiency of affidavits may be here noted. Order XXXVIII, Rule 11, provides that a judge may order to be struck out from any affidavit any matter which is scandalous; and Order XXXVIII, Rule 16, provides that no affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself.

some cause other than the party's fault;<sup>294</sup> he is not to allow the costs of any steps which have been due either to the party's over-caution or to his neglect;<sup>295</sup> and when costs are payable out of some fund he may direct that some of the interested beneficiaries be represented at the taxation, if they are not already before him. A new Rule on unnecessary costs which aroused great comment in 1883 is one which provides that a solicitor may be made to pay out of his own pocket any costs improperly incurred, as well as costs which, though properly incurred in the cause, have, through his neglect, proved fruitless to his client.<sup>296</sup>

None of the improvements outlined in the foregoing paragraphs has, however, had results which can compare in breadth of scope with the benefits which have been obtained through the development of the chamber work in the Chancery Division brought about by the perfection of what is known as the "originating summons," first introduced into the Rules of the Supreme Court in the revision of 1883.<sup>297</sup> To understand what a reformation it effected it is necessary to appreciate the difficulty it was designed to meet.

Decedents' estates are not administered, as a rule, in England, under the close supervision of the courts which is imposed in American systems of distribution. Once the will has been proved or letters of administration have been issued the executor or administrator goes ahead with the work of collecting and liquidating the assets and paying them out to creditors or beneficiaries, without reference to any court for the approval of claims or the audit of accounts. He is bound to account to the persons interested under the will, as any other trustee is to his *cestuis que trust*, but there is no court to which he must, in the ordinary case, submit his account for adjudication. Only if he fails to administer his trust with due diligence or in good faith, or if it is known

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<sup>294</sup> Order LXV, Rule 27 (24).

<sup>295</sup> Order LXV, Rule 27 (29).

<sup>296</sup> Order LXV, Rule 11. This was bitterly attacked by the solicitors in 1883, but it has remained unaltered and its application, while not frequent, is not rare.

<sup>297</sup> Order LV, Rules 3 to 11.

that he contemplates taking some step which the persons interested under the will consider will be inimical to their interests, or if the estate is insolvent, or if there is some doubt or dispute as to the persons rightfully entitled to receive funds or property from him, especially when he wishes to protect himself against a possible insufficiency of assets by an order of court before making any payments, is there any occasion for his coming or being brought into court. By gradual extension of its powers the Court of Chancery had, by the beginning of the nineteenth century, assumed exclusive jurisdiction over difficulties arising out of the distribution of decedents' estates,<sup>298</sup> and it was to equity that dissatisfied creditors or legatees and cautious executors or administrators turned for relief when any such occasion arose. There was but one way under the old equity procedure to obtain the benefit of the chancery machinery, and that was to bring a bill asking that *the entire estate* be administered by the Court of Chancery. Whenever, therefore, a single creditor felt aggrieved or a doubt arose out of a single phrase in the will there would be a struggle, more or less protracted, on bill, answer and affidavits, which would result in a judgment that all the funds and property in the estate should be paid into court; this would be followed by the taking of accounts and inventories *ab initio* of all the decedent's estate, real and personal, and of his debts, devises and legacies, all the items in which would have to be corroborated by affidavits and inquired into *seriatim* by a force of chief clerks, junior clerks, assistant clerks and other clerks to the chancery judges. Once the judgment was entered, the trustee became merely the agent of the court to receive and pay money, although each sum had to be handed on by him to the court after formal permission to pay it in had been granted, and no money could be

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<sup>298</sup> The growth is traced in Story, Pomeroy, and other works on Equity Jurisprudence. By reason of the creation by statute of probate courts which enforce the payment of a decedent's debts and legacies and demand an accounting from his executors and administrators, the equitable jurisdiction to administer decedents' estates has fallen into disuse in the State courts of the United States; it might still be invoked in the Federal courts by reason of diverse citizenship of parties. See Pomeroy, §1129. In most of the States, however, the ordinary courts of equity would still exercise jurisdiction over the administration of any trusts that were created in a will.

paid out until the court paymaster had been amply fortified with affidavits and certificates of authority for each separate payment. If there was property to be sold, the court would transact the sale itself, going into such infinite detail as to draw up, by its "conveyancing counsel," the auctioneer's "conditions of sale," the terms of payment and settlement, and the form for the public advertisement. When at last there was some distribution to be made there were more formalities about the proper certification and arrangement of the numerous and complicated priorities which the English law establishes in such a distribution. Every step in this process was attended with appointments before judges' clerks, repeated adjournments for time or further consideration, copying of documents, drawing up of reports, drafting of orders, and such shoals of affidavits and summonses that the weary beneficiaries were happy when they were at length rewarded with some proportion of the wealth that they had to watch slowly dissolving from their grasp.<sup>299</sup>

By 1850 the courts were beginning to realize they existed for the benefit of suitors, and the great Common Law Procedure Act was followed by several statutes effecting changes in the procedure of the Court of Chancery. One of these, the Amendment Act of 1852, contained a provision touching the particular problem now in hand.<sup>300</sup> It enacted that any person claiming to be a creditor of any deceased person or interested under his will might, without filing a bill in equity or taking any preliminary proceedings, summon the executor or administrator to appear in the chambers of a chancery judge, there to show cause why "the usual order for the administration of the estate of the deceased" should not be made. This had the effect of eliminating the expense and delay of the proceedings prior to the judgment for administra-

<sup>299</sup> See Parkes: *History of the Court of Chancery, or Mr. Birrell's lecture: Changes in Equity Procedure and Principles*, in: *A Century of Law Reform*. For a technical but admirably lucid account of the present procedure in the administration of a decedent's estate by the Chancery Division, see Stephen: *Commentaries on the Laws of England*, revised by Edward Jenks (16th ed., London, 1914), vol. 3, pp. 595-617.

<sup>300</sup> The Chancery Practice Amendment Act, 1852 (15 & 16 Vict., c. 86), §§45-47.

tion, by eliminating pleadings in equity and substituting for them a simple summons to appear and show cause, and by permitting the application to be dealt with in chambers instead of requiring it to go into the trial list and wait its turn for disposition. This was undoubtedly a great improvement, but it left the latter half of the abuse untouched; the judge could still make no other order than one for the general administration of the whole estate in chancery. He could not hear argument on the claim of one distributee and order payment made; he could only order that the entire estate be paid into court and there inquire into in the manner described. The theory was, of course, that while at law a creditor might previously have sued and collected his entire claim irrespective of the total assets in hand, the Chancellor, more tender in conscience, would make no payments until he felt certain that the distribution would be fair to all concerned. Where proceedings were hostile, therefore, even with the new facilities offered by the summons in chambers, an order for administration tied up the entire estate for an indefinite period. To be sure, there were many cases where the trouble was not actually contentious,—an executor might simply wish to get the court's protection, or its opinion on the propriety of a payment or sale; in that case he was obliged to arrange with the beneficiaries to file a bill in equity against them to which they would put in an answer, thus raising the point in question on the pleadings. Having obtained a decision on it at a preliminary stage, the executor would then stay the proceedings, pay the costs out of the estate, and act upon the interpretation of his duties so obtained. When the first Judicature Act was passed, that was the situation with regard to the administration not only of the estates of decedents but of trusts of every kind. In cases of doubt or dissatisfaction the only course open to the court was to take over the entire trust. Such an evil was rendered all the more acute by the enormous quantity of property which, in England, is held in trust either under wills or marriage settlements.

No change was made in the procedure in Chancery chambers by the 1875 Rules, all such practice being preserved by the clause

in the Act saving existing procedure not expressly superseded.<sup>301</sup> But the subject was given close attention when the Chancery Orders on chamber work were consolidated into the Rules in 1883, and the most difficult work of the draftsmen of the 1883 Revision Act in selecting parts of statutes to be repealed, was to separate the sections to be moulded into new Rules from the sections so clearly obsolete as to warrant deletion. Curiously enough one of the sections which they considered belonged in the latter class was that portion of the Act of 1852 whose operation has just been described; so unsatisfactory was the result it drew after its application—the throwing into Chancery of the entire estate—that its use had been resorted to only in rare instances. When the Lord Chancellor, who examined the revision bill with the same painstaking care he bestowed upon the drafts of the new Rules, came upon that section in the draft submitted to him for approval, he was struck by the fact that a provision containing possibilities for good should have fallen into disuse, and decided to withhold the section from the repealing act until he could consult with the two expert advisers of the Rule Committee on matters of chancery procedure, Sir George Jessel and Sir Edward Fry. The Master of the Rolls was emphatic in declaring that the procedure under the old Act was worth reviving and that it could be improved upon by giving the court power to decide the specific point raised in any single summons without ordering an administration of the whole estate in court. Mr. Justice Fry concurred in this view and, at Lord Selborne's request, drew up a set of Rules to carry out the new suggestion; they form the nucleus of Order LV, on Procedure at Chancery Chambers. Thus was born the "originating summons,"<sup>302</sup> whose growth has completely transformed the work of the Chancery Division.

Of the ten heads of equitable jurisdiction, cases arising under which are specifically assigned to the Chancery Division by

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<sup>301</sup> §21 of the Judicature Act, 1875.

<sup>302</sup> In an ordinary action a "summons" is a notice that some interlocutory application will be made, so it can never issue until after writ. In the cases where the new summons is permissible, it is not preceded by a writ, therefore it is said to "originate" the proceeding.

the Judicature Act,<sup>303</sup> two are selected in the new Rules as the proper departments within which the new procedure is to operate. All questions arising in the administration of any decedent's estate or of any trust, which before 1883 would have been the proper subjects of an administration action,<sup>304</sup> may now be raised by simply issuing a summons which states the nature of the relief required and enumerates the parties and interests affected thereby. All necessary parties are served and must be represented either individually or by classes when the matter comes up for the hearing in chambers. At the first meeting the applicant will present to the master the evidence in support of his application, in affidavit form; if the matter is such that the respondents have cause to object, the master will order them to file their evidence on affidavit and fix a time within which they shall do so; he may also allow the other side to file evidence in reply, and if necessary there may be cross-examination either before the judge in court, with his consent, or before one of the official examiners. When all the evidence is before the master he will make an order thereon, granting the relief prayed for or refusing it, except in those cases which, by the Rules or by the personal orders of the judges, must be dealt with by the judge in person. The master's decision, too, is subject to review by the judge to whose chambers he is attached.

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<sup>303</sup> §34 of the Judicature Act, 1873. It provides that there shall be assigned to the Chancery Division all causes and matters for any of the following purposes:

1. The administration of the estates of deceased persons.
2. The dissolution of partnerships, or the taking of partnership or other accounts.
3. The redemption or foreclosure of mortgages.
4. The raising of portions, or other charges on land.
5. The sale and distribution of the proceeds of property subject to any lien or charge.
6. The execution of trusts, charitable or private.
7. The rectification, or setting aside, or cancellation of deeds or other written instruments.
8. The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases.
9. The partition or sale of real estates.
10. The wardship of infants and the care of infants' estates.

<sup>304</sup> In 1885 the subject of redemption and foreclosure of mortgages was added, and later that of infants' estates. Proceedings under a variety of statutes are also directed to be begun by originating summons. These include especially the Trustee Act, 1893; the Settled Land Acts, 1882 to 1890; the Lunacy Acts, 1890 and 1911; the Land Transfer Act, 1897, and the Finance Act, 1894.

The entire proceeding will frequently be concluded within a very short period (unless unforeseen delays or difficulties arise) and the point decided "without the tedious and often unnecessary accounts and inquiries which were almost invariably directed by an administration decree or order under the old practice."<sup>305</sup>

In this manner a very large proportion of matters disposed of by the Chancery Division are dealt with.<sup>306</sup> It suffices in every case where either there is no dispute but merely a desire to take the opinion of the court, and in all cases where there is a dispute and the issue is so clear that pleadings would be unnecessary. The former class form numerically the larger of the two; it was said of matters to be disposed of by the originating summons, when its new form was developed: "The characteristic circumstance is that the claims, though open to contest, are in fact so little seriously contested, that the exercise of the jurisdiction presents the appearance rather of the mere administration of business than of the exercise of compulsory powers."<sup>307</sup> But the contentious matters are also numerous, and this method of dealing with them in chambers without the expense of pleadings or the delay of waiting for trial has caused the originating summons to grow steadily in the favor of that large portion of the English public whose interest in the proper administration of trust funds and property is intimate and sometimes pressing.

Perhaps the most interesting development of the originating summons came in 1893, when it was made possible for "any person claiming to be interested under a deed, will, or other written instrument," to issue one "for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."<sup>308</sup> This Rule was framed to facilitate the determination of short questions of

<sup>305</sup> Encyclopaedia of the Laws of England (2nd ed., London, 1906), vol. 2, p. 64, tit. Chambers, Chancery Division.

<sup>306</sup> In 1912 there were begun in the Chancery Division two thousand five hundred and thirty-seven proceedings by ordinary writ and two thousand eight hundred and nineteen by originating summons.

<sup>307</sup> 27 SOLICITORS' JOURNAL, 664 (August 4, 1883).

<sup>308</sup> Order LIV A, Rule 1.

construction which can be examined, without affidavits, upon the instrument itself,<sup>309</sup> and it is not confined to cases where an action might be brought in respect of the instrument.<sup>310</sup>

This concludes the review of the revision of 1883. The innovations that stand out highest are the insertion of the summons for directions and the development of the originating summons, both emphasizing the importance of the work done at chambers. Those who look for general tendencies will note that three influences make themselves felt all through the codification. The first, and the one most foreign to the spirit of procedure at common law, is the continued increase of official control over the conduct of actions, as opposed to free liberty for the litigants to do as they see fit. This is manifested not only in the complete control over the progress of an action vested in the master before trial, and at trial in the judge, but in the right of the Taxing Masters, at the conclusion of the controversy, to exercise their discretion in disallowing the costs of steps unnecessarily or negligently taken. Every application in the course of an action is considered by the officers of the court not in the abstract, but in relation to the subject-matter of the action, and their leave is a prerequisite to all but a very few steps that can be taken. The second influence represents a reversal of the common law practice in an opposite direction. In the early days of the King's courts pleadings were intended to inform the *court* of the exact issues between the parties; the refinements of pleading grew up on the court's passive willingness to let issues emerge out of the allegations recited to it by contending pleaders in antiphonal rivalry, and the stilted form which written pleadings eventually assumed was born of the tradition of care with which every statement in one's opponent's pleading had to be met to the court's satisfaction without disclosing to that opponent too much of one's own case. Today the prime function of pleadings is to give the *parties* mutually full information as to the number and nature of the issues to be heard at trial. The game is now played with the cards on the table. A party is entitled to know before he comes into court

<sup>309</sup> *Re Nobbs* [1896], 2 Ch. 830.

<sup>310</sup> *Mason v. Schuppisser*, 81 LAW TIMES REPORTS, 147 (1899).

with his witnesses the full extent of the case he must prove; and what is more important, he is entitled to know his opponent's line of attack sufficiently early in the litigation to decide whether or not it will be worth while to fight it out to trial. This tendency finds expression in the 1883 Rules in the increased power of the master to order, and of the parties to choose, that pleadings be dispensed with where the issues are clear, that when given they should contain full particulars, and that mutual discovery should be directed specifically to the parts of the case that will develop issues. The whole aim is to require the parties to give each other all the necessary information without superfluous parleying. The third tendency is the decided bettering in the malleability of judgments. Instead of the old blunderbuss judgment deciding the whole litigation in favor of one side or the other, the court is now able to select issues and parties carefully from the entanglements of a modern business transaction and so to frame its judgment as to reach each interest individually and completely. This is aided in the Rules of 1883 by increased facilities for the severing of claims undefended and parties not defending from those in contest, for dealing finally with third parties whose liability is established in the original action, for the raising of counter-claims, and for weeding out the issues and parties in any action in respect of whom the opening of judgment or the granting of retrial would be just.

None of these three influences began with the Rules of 1883, which merely followed along the lines laid down in the Schedule to the Act of 1875. Indeed, together with the decline of trial by jury, they may be regarded as the distinctive contribution of the Judicature Acts towards the reform of civil procedure and the attainment of the ideal when civil process instead of being, in the words of Lord Brougham, "a two-edged sword in the hands of craft and oppression," will become "the staff of honesty and the shield of innocence."

## IX.

Since 1883 no complete revision of the code of Rules has been effected by the Rule Committee, so that the "Rules of the Supreme Court, 1883," with their amendments, still express the adjective law of practice in the Supreme Court. Those amend-

ments, however, are by no means small either in number or in importance. The Rule Committee has constantly endeavored to meet the wishes not only of the profession but of all parties interested, in altering inconvenient or inadequate portions of the Rules, so that not a year has passed since 1883 without the addition of a body of amendments to the Rules already in force. So frequently do changes come that the annotated editions of the Rules used by practitioners appear annually, and each year's book is somewhat bulkier than the last.<sup>311</sup> The amendments vary from a short sentence intended to explain a doubtful phrase to whole Orders creating new methods of procedure. Three times, in 1885, 1893 and 1902, the Committee has, for special reasons, promulgated especially large batches of amendments, over one hundred and fifty Rules having been altered or added by the changes in those years alone; in some years only one or two Rules have been affected. Altogether nearly five hundred Rules have been altered or added since 1883.

It must not be supposed that this prolific activity has been viewed altogether with satisfaction by either the profession or the lay public. Every change in the Rules calls forth some protest. However eager some persons may be to persuade the Rule Committee to act upon their suggestions, others always raise their voices to let things stand as they are. It is left entirely to the Committee's discretion to balance the conveniences, and there is no doubt that for every suggestion it has followed it has rejected several, perhaps half a dozen, others. The fact is that new situations constantly arise which, if they were not provided for, would leave the Rules incomplete or inconclusive, so that the frequency of amendment appears to be a necessary evil.

An examination of the amendments made since 1883 reveals the fact that they were produced in response to a series of impelling causes whose wide variety bears testimony to the great adaptability and responsiveness of a procedure so contained. To trace the principal movements or concerted efforts for reform which they represent, the time from 1883 to the present may be

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<sup>311</sup> From 1875 to 1888 there appeared seven successive editions of Wilson:

conveniently divided into three parts, the most prominent episode in each of which was the issue of a set of Rules more numerous than those published in the average year. The three divisions center about 1885, 1893 and 1902.

The chief work of the Rule Committee in the first of these three periods was to introduce changes to reform chamber procedure in the Chancery Division of the High Court. The 1875 Rules did not extend to chancery practice, and in 1883 little more was done than to codify the scattered provisions of all the old Chancery Orders and statutes. But the development of the originating summons made chamber procedure in the Chancery Division a subject of the very first importance, and Lord Selborne determined to have it gone into and revised with the same thoroughness he had applied to the practice on the common law side through his Procedure Committee of 1881 and the subsequent revision.<sup>312</sup> In 1884, about a year after the R. S. C. 1883 had gone into effect, he appointed a committee of ten "to inquire into the subject of the existing rules as to the distribution of business in the courts and chambers of the Chancery Division, and the distribution of the clerical staff," at the head of which he placed Lord Esher, the Master of the Rolls.<sup>313</sup> That com-

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Judicature Acts and Rules, begun by Mr. (now the Rt. Hon. Sir) Arthur Wilson and carried on by him and others. In 1884 Mr. Thomas Snow began the Annual Practice, an annotated edition of the Judicature Acts and Rules, commonly known, from the color of its covers, as the White Book. It has appeared annually since that year, gradually growing in size; the 1914 edition contains over twenty-seven hundred pages. In 1899 an annual publication, which now rivals the White Book for popularity, was begun, called the Yearly Practice, or, colloquially, the Red Book. Its chief editor was Mr. M. J. Muir Mackenzie, one of the Official Referees; he was a joint editor of the Wilson book during its lifetime. The 1914 Red Book contains over twenty-five hundred pages. Both the White Book and the Red Book give copious annotations for every section of the Acts and Rules, citing thousands of decided cases.

<sup>312</sup> It will be remembered that Lord Selborne's Legal Procedure Committee of 1881 was restricted, in its investigations and recommendations, to procedure in the Queen's Bench Division of the High Court.

<sup>313</sup> The other members were Mr. (later Lord) Justice Kay, Mr. Justice Pearson, Mr. J. (later Mr. Justice) Stirling, Mr. M. Ingle (now Mr. Justice) Joyce, Mr. Horace (later Lord) Davey, Q. C., Mr. Frank (now the Rt. Hon. Sir Francis) Mowatt, C. B., Mr. (now Sir) Kenneth Muir Mackenzie, Mr. Henry Roscoe and Mr. Thomas Marshall. At the time of its appointment, therefore, the Committee contained three judges, three barristers, two solicitors, one lay member of the civil service, and the Lord Chancellor's Secretary.

mittee, which became known as the Chancery Chambers Committee, heard evidence during November and December, 1884, from judges, registrars, taxing masters and chief clerks in the Chancery Division, and also from prominent solicitors engaged in chancery work. The Incorporated Law Society laid before the Committee a series of recommendations advocating the simplifying of the method of drawing up orders in chambers.<sup>314</sup> On August 7, 1885, the Committee signed a Report for transmission to the Lord Chancellor together with a set of Resolutions proposing definite additions to the R. S. C. and changes in the organization of the Chancery Division.<sup>315</sup>

Principal among the conclusions it submitted was one favoring a re-arrangement of chancery work which would assure to witness actions a favorable opportunity of continuous and unbroken hearing. That touched what had been the greatest obstacle to the prompt handling of chancery actions. It must be understood that the average action on the chancery side involves not only the hearing of issues, with or without witnesses, by the judge sitting in open court, but a considerable amount of chamber work in the course of which all preliminary or interlocutory applications are disposed of and decrees worked out after they are handed down; it is in chambers, rather than in court, that the distinctive machinery of the Chancery Division is seen in operation, performing the equitable administration and distribution of assets. It was the custom to assign each action in that Division to one of the five judges in it, who would thereafter have complete *seisin* of all proceedings in the action, and chamber applications in it would be heard by his own staff of clerks, acting as deputies for him. Frequently, however, parties, dissatisfied with the decision of the judge's chief clerk, would wish to have it reviewed by the judge himself; again, certain important chamber matters were reserved for the decision of the judge in person. For these cases the judge would have personally to sit in cham-

<sup>314</sup> These are enumerated in 29 SOLICITORS' JOURNAL, 773 (October 17, 1885).

<sup>315</sup> The Report was ordered printed by the House of Commons, March 29, 1886, and appears in Parl. Pap. 1886, LIII, 127; also in full in 30 SOLICITORS' JOURNAL, 518, 552 (1886).

bers. To get time to do his chamber work, which was always heavy, a judge would either have to sit after four in the afternoon, wearied by a whole day of trial work in court, or simply cancel the trial work and sit for whole days exclusively in chambers. The latter course was the one most followed, with the result that there would frequently be breaks of several weeks together in the hearing of each judge's trial list of witness actions. Consequently it often happened that witnesses and parties were hung up for weeks at a time, without knowing just when they would be called upon to appear. How troublesome and expensive such delays were it is easy to understand.

What the Committee proposed was to appoint an additional judge to the Division, and then divide the six judges up into three sets of two each; each pair of judges would be given the power to handle actions assigned to either of them, and they would so arrange their time that while one sat in court the other sat in chambers; every week or month they would change about. There would thus be established in the Chancery Division three sub-Divisions, in each of which there would always be both a chamber judge and a court judge continually sitting. This plan, known as the "linked judge system," and adopted by the Chancery Chambers Committee after lengthy discussion of several expedients submitted to it with the same end in view, was first devised by Horace Davey, Q. C., one of the barrister members of the Committee, who later, as Lord Davey, sat in the Judicial Committee of the Privy Council. Its approval and subsequent adoption by the Rule Committee (though not until many years later<sup>316</sup>) enabled the judges in the Chancery Division so to clear off their arrears of work that to the present day that branch of the High Court, long notorious for its unconscionable delays, has always kept completely abreast of its trial lists and left far behind its former reputation for apathy and neglect.

Subjoined to the Report of the Committee was a series of Resolutions containing suggestions for minor improvements in the procedure before the chief clerks in chancery chambers and before the taxing masters. Most of these were adopted *verbatim*.

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<sup>316</sup> Order V, Rule 9 A, November, 1900.

by the Rule Committee and issued as new Rules in 1885.<sup>317</sup> Some useful changes they introduced were that accounts might be vouched in the offices of solicitors, only items for surcharge or contest being brought into chambers,<sup>318</sup> and that the court might stay proceedings brought to demand an account from an executor or trustee, to give the respondent time to file the missing account and so save costs.<sup>319</sup> Two of the new Rules, at least, trace back to the recommendations submitted to the Chancery Chambers Committee by the Law Society in 1884; one allowing counsel to be briefed to appear at the hearing of important applications in chambers;<sup>320</sup> and another requiring all orders made in chambers to be drawn up by the chief clerk himself, except those to be acted on by the Paymaster.<sup>321</sup> An innovation introduced by the Rule Committee apparently on its own initiative was to extend the originating summons to proceedings on foreclosure and redemption of mortgages; these have now become a very large proportion of the instances in which the originating summons is applied.<sup>322</sup> The R. S. C. 1885 also included eight Rules on procedure before the taxing masters,<sup>323</sup> and nine Rules to unify the three or four methods of appeal previously in use from inferior courts to the High Court.

Another peculiarity of the distribution of duties in the Chancery Division that came in for close attention soon after 1883 was the relation between the functions of the chief clerks and those of the registrars. The office of a chief clerk has been described above; he sits in the chambers of the judge to whom he is attached, to dispose of all applications made to the judge which

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<sup>317</sup> The R. S. C. 1885 may be found in 30 SOLICITORS' JOURNAL, 143 (December 26, 1885). They contain fifty Rules, of which thirty-two are taken from the Resolutions of the Chancery Chambers Committee.

<sup>318</sup> Order XXXIII, Rule 4 A, from Resolution 38 of the Report.

<sup>319</sup> Order LV, Rule 10 A, from Resolution 39 of the Report.

<sup>320</sup> Order LV, Rule 1 A, from Resolution 20 of the Report. This put an end to the diversities of practice at chambers amongst the various chancery judges.

<sup>321</sup> Order LV, Rules 74 and 74 A, from Resolution 28 of the Report. Previously every order of a chief clerk had to be formally drawn up by the Registrars, just as is now done with judgments rendered in open court.

<sup>322</sup> Order LV, Rule 5 A.

<sup>323</sup> Order LXV, Rules 19 A to H, from Resolution 40 of the Report. Most of these were altered, however, in 1889.

do not have to be made in open court; a few matters are excepted from his powers, either by the Rules or by the judge's personal direction, and must be heard by the judge in person. Two chief clerks are attached to each Chancery judge, and each chief clerk has under him a staff of subordinate clerks who do all the clerical work involved in the accounts and inquiries which form so large a part of the business in chambers. The chief clerk is a sort of *député* for the judge, so that orders made by him are supposed to be made by the judge himself. Dissatisfied parties may ask the judge to review his chief clerk's decision by merely "adjourning the summons" to be heard by the judge. The judge will not as a rule, however, vary his chief clerk's certificate, as each chief clerk knows pretty well how his judge will act; if he is in doubt, he will of his own motion adjourn the summons to the judge. Since 1897, the chief clerks are styled "masters," though no change whatsoever in their duties was made by the change in title. The registrars, on the other hand, are officers whose duty it is to draw up the orders and judgments pronounced by the court. There are twelve registrars, and each one sits each day in a different court either in the Chancery Division or in the Court of Appeal, according to a rota. Decrees in the Chancery Division are far more complicated than the judgments on the common law side, and require to be drawn up with great precision, having regard to all the interests affected—for instance, in the distribution of a fund—and to all the documents and facts upon which the court is moved to act. "It may look to an outsider a curious thing," said a witness before the 1884 Chancery Chambers Committee, "that an order of the court should be a complicated matter, but I know few things that are more complicated. . . . The registrars are a body of men trained up from their youth in orders." When the order is one pronounced in open court the registrar bases his draft on his own notes and on the information furnished him by the opposing solicitors, who must appear before him for that purpose. If it is one delivered in chambers, the registrar draws it up from the master's notes.<sup>324</sup> Another witness explained, before the Com-

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<sup>324</sup> See Daniell: *Chancery Practice* (8th ed., 1914), vol. I, c. xv, "Judg-

mittee: "In all orders made on proceedings in chambers the *materials* are supplied by the chief clerk (master) and the *form* is supplied by the registrar. . . . The chief clerk's note for the order may be about twenty words, and the order may be about fifty folios." Besides these two classes of semi-judicial officers there is a third whose powers are equally great—the taxing masters. As their title indicates, they have the power to ratify bills of costs delivered at the conclusion of a controversy, to cut down charges made or to strike out items, and to protect parties from overcharging by either their own solicitors or their opponents'. Formerly there were separate taxing masters for each Division of the High Court, but in 1902 they were all consolidated into one office which performs the taxation for all Divisions, the work being distributed among twelve masters according to a rota.<sup>325</sup>

One of the Resolutions of the Chancery Chambers Committee proposed that there should be some effort to do away with the distinctions between these three classes of officers in the Chancery Division, but the only action in that direction taken by the Rule Committee in 1885 was to order that thereafter the chief clerks should themselves draw up most of the chamber orders instead of sending them to the registrars. In May, 1887, Lord Halsbury, was persuaded to appoint a committee to consider a possible amalgamation of the officers of registrar, chief clerk and taxing master in the Chancery Division,<sup>326</sup> but the report of that committee only brought out the inadvisability of any such amalgamation. The technical training required for the registrar's work was the strongest argument against throwing his duties on to the chief clerk; and the impartiality necessary in a taxing master showed how unwise it would be to give his powers to the chief clerk. Mr. Justice Pearson testified before the 1884 Committee:

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ments and Orders;" also article on "Registrars," in Encyclopaedia of the Laws of England. It ought to be mentioned that these "notes" are important, in the absence of stenographic reports of proceedings.

<sup>325</sup> The chief clerks (masters) in judges' chambers and the taxing masters are always ex-solicitors; the registrars are drawn from the Bar. The salary of all three offices is about £1500 per annum.

"It is, in my judgment, a great advantage that the taxing masters are entirely separated from all matters, in respect of which they have to tax bills of costs, in their earlier stages. They are thus kept independent and impartial, and no solicitor need fear their being prejudiced by any opinion they have formed in the progress of the litigation."

In 1889 there occurred an event which throws an interesting side-light on the way new Rules can be adapted to pressing circumstances by the rule-making authority. In May of that year, Mr. Justice Kay, who was well known for his disposition to cut down the costs allowed to solicitors wherever possible, was a member of the Rule Committee and procured the passage of the following addition to the Order on costs:<sup>327</sup>

"If, in any case in which a taxation is directed with a view to the payment of the costs out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the costs shall have been increased by unnecessary delay, or by improper, vexatious or unnecessary proceedings, or by other misconduct or negligence, or if from any other cause the amount of the costs shall, in the opinion of the taxing master, be excessive, having regard to the value of the fund, estate, or assets to which they relate, or other circumstances, the taxing master shall allow only such an amount of costs as would, *in his opinion*, have been incurred if the litigation had been properly conducted, and shall assess the same at a gross sum, and shall (if necessary) apportion the amount among the parties."

This was an attack upon the solicitors too obvious to permit of its being overlooked, and on May 17, 1889, a meeting of solicitors at the Law Society passed a resolution "that the Council be requested to take immediate steps for obtaining a suspension, pending a revision, of the Orders of May, 1889." A week later the Council presented a report protesting strongly against the arbitrary wording of the new Rule. They said: "If the words of the regulation do not in terms preclude an appeal, they practically make an appeal impossible, place the taxing master in a

<sup>326</sup> The Committee was composed of Mr. (now Sir) Kenneth Muir Mackenzie, the Lord Chancellor's Secretary; L. L. Pemberton, a registrar; Charles Burney, a chief clerk; John V. Longbourne, a taxing master; and two others. Its report has never been published.

<sup>327</sup> Order LXV, Rule 27 (38 A), to establish the practice approved of in *Brown v. Burdett*, 40 Ch. Div. 244 C. A. (1888).

position of irresponsibility unknown to any other tribunal in the country, and override all Acts of Parliament, rules of court and decisions."<sup>828</sup> A few weeks later<sup>829</sup> the Rule Committee, impressed by the intensity of the opposition it had aroused, but still convinced that the regulation was right in principle, issued an amendment striking out the words "in his opinion" from the body of the Rule, and adding to its end:

"The provisions as to the *review* of taxation shall apply to allowances and certificates under this Rule,"

thereby acceding to the solicitors' demand for a right of appeal. In 1902 the Rule was extended to apply to *any* taxation, instead of only to cases where costs are payable out of a fund. It is liberally interpreted, however, and its application has not been frequent enough, since its author's death, to be a source of active worry to practitioners.

Two statutes passed near the end of this first period had an important effect on practice in the High Court—the County Courts Act, 1888, and the Arbitration Act, 1889. The former consolidates Acts providing for the remission from the High Court to a County Court of practically all actions where the sum in dispute is under £100;<sup>830</sup> the latter prescribes the procedure to be followed in arbitrations and in putting in contest the sufficiency or validity of arbitrators' awards.<sup>831</sup>

## X.

The second period, from 1890 to 1897, was marked by the issue of an important set of new Rules in 1893, the enactment of several statutes altering the constitution of the rule-making authority, the creation of a commercial court by the judges themselves without the aid of either Parliament or the Rule Committee, and an attempt (which failed of completion) to introduce a revision of the code formed by the R. S. C. 1883 and their numerous amendments.

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<sup>828</sup> The full report appears in 33 SOLICITORS' JOURNAL, 495 (June 1, 1889).

<sup>829</sup> June 24, 1889.

<sup>830</sup> 51 & 52 Vict., c. 41. The limit was raised from £50 to £100 by an amendment in 1903.

<sup>831</sup> 52 & 53 Vict., c. 49.

Over one hundred Rules had, by 1890, been added to the original text of 1883 or subjected to some alteration; in addition, successive Judicature Acts, in 1884, 1887, 1888 and 1890, had patched up small leaks in the previous ones, so that the old inconvenience of having to search in a dozen places for the correct practice was once more felt and, as before, gave rise to agitation for a revision of the Rules. In February, 1890, Mr. Thomas Snow, the founder of the "Annual Practice" (the White Book), and then its editor, addressed a letter to the Council of Judges pointing out that one-fifth of the sections of the Judicature Act, 1873, had been replaced, altered or suspended, that nearly all the thirty-five sections of the Judicature Act, 1875, had been amended or repealed, wholly or in part, and that about ten of the twenty-five sections of the Appellate Jurisdiction Act, 1876, had been similarly dealt with.<sup>332</sup> He suggested there should be a codification of all the Acts on judicature, with a view to placing all the sections on court organization in one Act, and all those on jurisdiction and procedure in another; to accompany this he urged the necessity for a revision of all the Rules of Court, citing the fact that over four thousand decisions had been handed down upon them since their birth. What impression was made on the rule-making body by this letter does not appear to be recorded. A few months later, in April, Mr. Snow, full of his subject, wrote again, confining himself this time to pointing out contradictions in the Rules made by the Committee for the operation of the new Arbitration Act, 1889.<sup>333</sup> No sign was given by the Rule Committee in response to this, as to its attitude on the question, but on July 17, 1890, Lord Esher, the Master of the Rolls, one of the eight judges who then composed the Committee, moved in the House of Lords for a Commission to look into the administration of the law under the Judicature Acts. He laid especial emphasis upon the abuse of summonses for discovery and interrogatories, the old trouble that had been complained of to Lord Selborne's Committee as far back as 1881. Although he

<sup>332</sup> The substance of the letter is quoted in 34 SOLICITORS' JOURNAL, 244 (February 15, 1890).

<sup>333</sup> The letter appears in full in 25 LAW JOURNAL, 268 (May 3, 1890).

was supported in his argument by Lord Herschell, the motion was dropped upon the opposition of the Lord Chancellor (Lord Halsbury), who expressed the view that the Rule Committee had ample powers to make any necessary changes.<sup>334</sup> In spite of this assurance, no action was taken, and in the Lower House, nearly a year later, Mr. Atherley-Jones had an evening set aside to discuss a similar motion, but it failed to attract a quorum.<sup>335</sup>

Though nothing came of these formal efforts to get something done the judges were obviously restless under the constant criticism of their failure to improve matters, and in December of 1891 Lord Justice Bowen and Mr. Justice Mathew, whose vigor and enterprise had considerably enlivened the work of the 1881 Procedure Committee of which both had been members, addressed a letter to Lord Coleridge calling his attention to many points in the working of the judicature system which were in need of investigation and amendment. The Lord Chief Justice, in turn, in a correspondence which was later made public,<sup>336</sup> emphasized anew to the Lord Chancellor the need for action which was earlier asked for by Lord Esher in Parliament, and pointed out that the proper course would be to call together a Council of all the judges, under Section seventy-five of the Act of 1873, without further delay. To this Lord Halsbury assented and he ultimately fixed on June as the most convenient time for the meeting. Although the Act requires that an annual Council should be held, no such meeting had been called since 1884, so that the section was (and is today) practically a dead letter and the judges were not expected to accomplish very much under its auspices.<sup>337</sup> But more things seem to happen when not very much is expected.

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<sup>334</sup> The debate is reported in Hansard, 3rd ser., vol. 347, cols. 32-65 (1890).

<sup>335</sup> Now His Honour Judge Atherley-Jones, K. C., Judge of the City of London Court. A speech favoring the motion was prepared by Mr. Pitt-Lewis, Q. C., but never delivered. It appears in 91 LAW TIMES, 122 (June 13, 1891).

<sup>336</sup> It appears in 92 LAW TIMES, 163 (January 9, 1892).

<sup>337</sup> 36 SOLICITORS' JOURNAL, 158 (January 9, 1892): "Probably the true remedy for the present state of things in the Supreme Court is to be found in another direction entirely. . . . It would be an obvious reform to place the management of its business under the control of a Minister of Justice, less ornamental but more useful than the Lord Chancellor, who would be

There was no lack of material for the Council to work upon. During the five months before it met there were submitted to it resolutions from the Law Society and the Bar Committee and suggestions from many individuals. In February Mr. Snow once more sent to the judges a communication strongly advocating a complete revision of the Rules and giving specific examples of weak spots that ought to be repaired,<sup>338</sup> quoting Lord Campbell's expression that "the due distribution of justice depends much more upon the rules by which suits are conducted than on the perfection of the code by which rights are defined." A small committee of judges, appointed to draft resolutions upon which the full Council could agree, drew up one hundred and one resolutions covering all the reforms being asked for, and some of the judges wrote out lengthy criticism of these Resolutions which were also laid before the Council.<sup>339</sup>

For three days, the seventeenth, the twenty-first and the twenty-third of June, 1892, the Council in formal meeting considered and debated all these recommendations and concluding by adopting a series of one hundred Resolutions advocating changes in the arrangement and conduct of the High Court's business.<sup>340</sup> The Report includes comment on and definite proposals for changes in the circuit system, interlocutory applications for discovery and judgment, fixing of place of trial, creation of a commercial court, chamber work in the Chancery Division, taxation and payment of costs, and the allowing of appeals. Many of these are taken from the recommendations made by the Law Society in March—a fresh evidence of the keen and intelligent interest the solicitors as a body have always taken in the re-

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responsible for its due conduct to Parliament." An interesting advocacy by Mr. Thomas Snow of the creation of a Ministry of Justice appears also in 16 LAW QUARTERLY REVIEW, 129 (1900).

<sup>338</sup> Printed in 27 LAW JOURNAL, 104 (February 6, 1892). He also published an article in 8 LAW QUARTERLY REVIEW, 129 (1892), in which he developed a boldly original scheme for an entire reorganization of the judicature.

<sup>339</sup> Those of Mr. Justice Cave are printed in 93 LAW TIMES, 375, 402 (1892).

<sup>340</sup> They appear in full in 36 SOLICITORS' JOURNAL, 716 (August 13, 1892). For an account of Lord Bowen's work upon these resolutions, see his "Life", by Sir H. S. Cunningham (London, 1897), p. 173.

form of procedure.<sup>341</sup> On the whole, the Report was received with great favor in legal circles,<sup>342</sup> and the breadth of its scope was regarded as testifying to the desire of the Bench as a whole to maintain the efficiency of every department of the court's procedure. But no mention was made in it of the codification of already existing Acts and Rules for which there was such a strong demand, and this omission was adversely criticized.<sup>343</sup>

Before Lord Halsbury could make any use of this Report the general election of 1892 retired his party from office and Lord Herschell resumed his place on the woolsack. His return opened up a period of real activity in the progress of procedural reform. He first asked the Bar Committee and the Council of the Law Society to give him an official expression of the views of the two branches of the profession on the Report of the judges. By the close of the year these were in his hands<sup>344</sup> and he was able to submit to the Rule Committee a definite program for the formulation of new Rules, based on the advice of the judges and elaborated by the technical criticisms of solicitors and barristers in active practice. Discussion in the Committee continued over several months and at length, soon after the close of the Long Vacation, in November, 1893, a batch of over sixty Rules was signed and published, carrying into effect many of the reforms which had been under consideration. In the main the Rules of

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<sup>341</sup> At the Annual Provincial Meeting of the Incorporated Law Society at Norwich in 1892 no less than three speeches were made analyzing the Report of the Council of Judges, and comparing it with the recommendations submitted by the Law Society in 1882 and 1892. They are printed in 36 SOLICITORS' JOURNAL, 805 (Mr. Richard Pennington, President), 813 (Mr. John Hunter), and 815 (Mr. E. K. Blyth).

<sup>342</sup> Articles from the Saturday Review, the Liverpool Post, the Dublin Freeman's Journal, the Notts Guardian, and the Glasgow Herald are reprinted in 93 LAW TIMES, 430 (September 17, 1892).

<sup>343</sup> See articles on "The Judges' Report on Practice," in 8 LAW QUARTERLY REVIEW, 289 (1892).

<sup>344</sup> The report from the Bar appears in 94 LAW TIMES, 183 (December 24, 1892); that from the Law Society in 37 SOLICITORS' JOURNAL, 159 (January 7, 1893). This effort at coöperation was characteristic of Lord Herschell's attitude toward the subject, and was appreciated. A writer in 37 SOLICITORS' JOURNAL, 57 (November 26, 1892) said: "The request shows that we have now got a Lord Chancellor who recognizes that the criticisms of both branches of the profession are of value with regard to a scheme framed by judges, and who may be relied on to consider and give full weight to every reasonable suggestion."

November, 1893, deal with six topics, all of which figured in the discussions of the Council of Judges. They are the service of process outside the jurisdiction, summary judgment in liquidated claims, the summons for directions, discovery, originating summonses, and the curtailment of pleadings.

As to the first, the power of English judges to order service of writs outside the jurisdiction was extended to include originating summonses.<sup>345</sup> When this became known, the Scotch members in the House of Commons, for some reason, thought it a reflection on their Scotch courts that domiciled Scotchmen should be liable to be made involuntary parties to litigation in England. In point of fact, the new Rule simply extended a recognized practice, and applied equally not only to Scotland but to all places outside England. But the Scotch members plied the Front Bench with questions until on January 11, 1894, the Rule Committee issued a new Rule marked "urgent" annulling the 1893 Rule on service of originating summonses out of the jurisdiction, and it has never been reinstated.

The procedure on recovery of summary judgment on liquidated claims was rendered more flexible by making it possible for a plaintiff to strike out of his writ any claims which, on the hearing, appear to be improperly classed as liquidated;<sup>346</sup> and the procedure was made highly effective by the creation of a new trial list, known as the "Short Cause List,"<sup>347</sup> on which short actions for summary judgment can be placed and disposed of at once if a trial is necessary. The success of that list proves that nothing will so completely take the heart out of the average defence in an action where the claim is for a liquidated amount as the prospect of an immediate trial. In considerably more than half the cases which fall into this category defendants of recent years, though entering appearance, have failed to apply for leave to defend. The summons for directions was extended to all actions except those assigned to the Chancery Division, but

<sup>345</sup> Order XI. The R. S. C., 1893, are printed in full in 38 SOLICITORS' JOURNAL, 72 (December 2, 1893).

<sup>346</sup> Order XIV, Rule 1 (b).

<sup>347</sup> Order XIV, Rule 8 (b).

it was still left optional.<sup>348</sup> It was not until 1897 that it was made compulsory and extended over chancery actions as well.<sup>349</sup>

Interlocutory applications, especially for leave to obtain discovery of documents and to administer interrogatories, had always, since 1875, been the *bête noire* of procedure reformers, and the new regulations made in Order XXXI by the R. S. C. 1893 seem to be the most satisfactory arrangement that could be arrived at, since they have remained unaltered ever since. The principal change they made is that, though interrogatories may be delivered in any case, the leave of a master must first be obtained and he must approve the specific questions to be asked; he may, if he considers proper, alter their number, extent or form.<sup>350</sup> Discovery of documents was made less of a burden to suitors by a new provision that where the documents to be inspected are business books or entries verified copies will suffice, provided mention is made in the affidavit of any erasures, interlineations or alterations in the original. On another point, it was always the rule (as it is now) that the "affidavit of documents," stating in separate schedules what relevant papers a party possesses and for which of them he claims privilege from inspection, is "conclusive"—that is, that the party's opponent must accept it as true and cannot cross-examine upon it. But that conclusiveness was made less formidable by two new Rules of 1893, one of which allows the master to order a party to state whether he has or had any *specific* document which his opponent makes oath he believes to be in the party's possession, and the other of which permits the master, where, on an application for an order for inspection, privilege is claimed for any document, to inspect the document for the purpose of deciding as to the validity of the claim of privilege.<sup>351</sup>

An important addition to the powers of the court was made in an extension of the originating summons, under which, by the new Rule, any person claiming to be interested under an instru-

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<sup>348</sup> Order XXX, Rule 1.

<sup>349</sup> R. S. C., May, 1897.

<sup>350</sup> Order XXXI, Rules 1 and 2.

<sup>351</sup> Order XXXI, Rules 19 A (1), (2) and (3).

ment in writing, may apply for the determination of any question of construction arising thereunder, and for a declaration of his rights.<sup>352</sup>

Lastly, the Rule Committee paid their respects to a difficulty which had puzzled them for many years. Ever since Lord Selborne's Procedure Committee of 1881 had recommended the complete abolition of pleadings the question of how to lessen the expense and delay of bringing the parties to issue had always been the first one discussed in any argument on procedural reform. Despite the improvements of 1883 in this regard, litigation was slowly drifting away from the courts into the hands of boards of arbitration; in fact practically every business contract contained a clause binding the parties to submit any dispute arising therefrom to arbitrators, and the Arbitration Act, 1889, was passed to provide a uniform mode of procedure in the innumerable small arbitrations that were constantly going on. The chief complaint against the law courts voiced by business men was (and still is) that they never knew, after an action was commenced, how long it would take to finish it or when the trial would occur, whereas in arbitration they fixed on a time and place for the hearing satisfactory to all parties and the thing was over without uncertainties to cause them worry. To win back to the courts the suitors who were thus turning their backs upon the judges, the Rule Committee invented a new procedure called "proceeding to trial without pleadings," and enshrined it in the R. S. C. as Order XVIII A. It provides that in any case where he chooses to do so, the plaintiff may indorse on his writ "a statement sufficient to give notice of the nature of his claim or of the relief or remedy required in the action," and a further notice "that if the defendant appears, the plaintiff intends to proceed to trial without pleadings." Thereupon the defendant may either insist that there should be pleadings and obtain the leave of a master for them, or give mere notice of any special defences and allow the action to be entered for trial. The intention of the Rule Committee was to provide a speedy conclusion, analogous

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<sup>352</sup> Order LIV A. This is described in §8 of this article, with originating summonses.

to the summary judgment under Order XIV procedure, for claims which, though simple, were not liquidated and could therefore not obtain the benefit of Order XIV by being specially indorsed. Laudable as that intention was, the design has failed utterly of accomplishment. Order XVIII A has never found favor with litigants and is now, for all practical purposes, useless. In the beginning it caused a great deal of confusion by being confounded with Order XIV; solicitors would add to a special indorsement under Order III, Rule 6, a notice under the new Order, for trial without pleadings, so that their applications for summary judgment put them in the position of asking for judgment *without* a trial, in the same breath with which they were asking *for* a trial without pleadings. But after that was cleared up, plaintiffs were not attracted by the possibility of going to trial without an inkling of the defendant's case, and practically no one was hardy enough to take such a risk in exchange even for the elimination of delay.<sup>353</sup>

It was obvious to those familiar with the situation that Order XVIII A was an attempt to provide distinctive treatment for commercial causes without arousing Lord Coleridge's firm opposition to anything that would savor of the creation of a separate court for them. He was "entirely opposed to a change which involved the suggestion that all the members of the Bench were not equally fit to cope with every subject of litigation. He thought that all judges were, or ought to be considered, capable of dealing with all classes of cases,"<sup>354</sup> and it was his objection that rendered futile the long continued effort to set up a separate court or list for commercial cases. As far back as 1874, the Judicature Commissioners in their Third Report definitely recommended that mercantile trials should be before a judge assisted by two skilled mercantile "assessors," instead of before judges either alone or with juries whose knowledge of technical

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<sup>353</sup> There appears to be only one reported case in twenty-one years interpreting the Order: *Greene v. St. John's Mansions*, 35 WEEKLY NOTES, 9 (1900). No others are cited in the 1914 Red Book or White Book.

<sup>354</sup> From p. 13 of Mr. Theobald Mathew's: *Practice of the Commercial Court* (London, 1902).

commercial matters was superficial.<sup>355</sup> But the proposal was disregarded by the authors of the first Judicature Acts and nothing was done to provide specially for mercantile cases except to continue the old sittings at the Guildhall, where actions were tried with special juries from the City of London. These, however, were discontinued when the new Law Courts building at Temple Bar was opened in 1882, and then the merchants became even more impatient of the delays of justice, and more wedded to the practice of informal arbitration of disputes. But arbitration has its disadvantages—at best it is good to settle only disputes of fact; where the dispute involves a point or points of law the umpire's award is frequently incomplete or unsatisfactory. "For real acrimony and dispute," says a prominent London solicitor, "give me a friendly arbitration where there is a difference on the law." There were, therefore, frequent efforts to persuade Parliament or the Bench to provide special facilities for the trial of commercial actions by Her Majesty's judges. In June, 1888, a special joint committee from the Law Society and the Bar presented to the Lord Chancellor a report which was in effect an official petition from the profession for the creation of a separate commercial list. In response to this Lord Halsbury, in 1891, caused to be passed an Act to revive the Guildhall Sittings, in the belief that if trials were once more held within the precincts of the City itself, the City merchants could be persuaded to come back to the court.<sup>356</sup> But this geographical concession quite overlooked the root of the difficulty—the delays and uncertainties of the trial list—and the new move was a failure from the start. The Act has never been repealed, but the Guildhall Sittings were soon abandoned. In January, 1892, a joint committee of the Law Society and the Bar, in submitting resolutions to the Lord Chancellor (to be laid before the Council of Judges Lord Halsbury had been moved to call), repeated the petition of the 1888 committee, expanding it

<sup>355</sup> Parl. Pap., 1874, XXIV, Reports from Commissioners, xiii. The minutes of evidence relating to tribunals of commerce in Continental countries are a rich mine of information for comparative purposes.

<sup>356</sup> The Judicature (London Causes) Act, 1891, 54 & 55 Vict., c. 14.

into a definitely outlined scheme for the disposal of cases of a mercantile character in a separate list,<sup>357</sup> and the Report issued by the Council of Judges in June contained eight Resolutions favoring the adoption of the scheme.<sup>358</sup> Their plan included the assignment of all mercantile cases to two judges who would hear them independently of the general trial list, and the establishment of a special jury panel of mercantile men for the new list—a kind of modern version of Lord Mansfield's famous jury of merchants. But the Commercial List was one of the Council's suggestions which the Rule Committee refused to adopt in 1893, probably because of the Lord Chief Justice's well known antagonism to it.

A few months later, in May, 1894, the judges of the Queen's Bench Division, under the power conferred upon them by the Judicature Act to make arrangements among themselves for the disposal of business coming into the Division, issued a set of resolutions to regulate the composition of the trial lists,<sup>359</sup> and in that document they inserted one resolution to the effect "that it is desirable that a list should be made of Commercial Causes to be tried at the Royal Courts of Justice by a Judge alone, or by jurors summoned from the City." But it is significant that of the three names of Queen's Bench judges not among those subscribed to the resolutions, one is that of Lord Coleridge, the Lord Chief Justice, and that may explain why nothing was done in pursuance of this part of the resolutions.

In June, 1894, Lord Coleridge died, and was succeeded by Lord Russell of Killowen. The new Lord Chief Justice did not share his predecessor's feelings about the Commercial List, and, assured of his support, Mr. Justice Mathew and Lord Justice Bowen, who, from the beginning, had been the most earnest advocates of the new departure, perfected the arrangements they considered necessary to inaugurate the List. In February, 1895, there was issued the famous "Notice as to Commercial Causes,"

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<sup>357</sup> Printed in 36 SOLICITORS' JOURNAL, 203 (January 23, 1892).

<sup>358</sup> Resolutions 32 to 39. Printed in 36 SOLICITORS' JOURNAL, 719 (August 13, 1892).

<sup>359</sup> These appear in the Red Book and the White Book; also in 38 SOLICITORS' JOURNAL, 528 (June 9, 1894).

which finally gave it birth.<sup>360</sup> The system it established is so simple that it required no alteration in any Act of Parliament or Rule of Court, and accomplished its object merely by giving full exercise to powers already possessed by the judges. One judge is designated to hear commercial causes, which are loosely defined as "causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and commercial agency, and mercantile usages." A separate list is kept of such causes, called the Commercial List, in which actions can be entered only by leave of the judge for the time being taking the List. Once entered in that List, the summons for directions and all interlocutory applications in the action are heard by the judge himself and not by a master. The List is independent of the general trial lists, so the judge devotes his entire attention to it at all times until every action entered in it has been heard. Furthermore, in disposing of interlocutory applications in this List he exercises to the full the powers conferred in the Rules to eliminate pleadings, to restrict discovery, to relax the strict rules of evidence, and to save expense at every turn. As a consequence the List is never in arrear and parties enjoy the great benefit of being able to have a day certain appointed for the trial which is mutually convenient.<sup>361</sup>

Part of the undoubted success of the Commercial List and its reputation for speedy procedure must be ascribed to the fact that comparatively few cases are entered in it.<sup>362</sup> If all the actions begun in the King's Bench Division could be given the same attention by the judges it is certain that arrears would be a thing of the past in every List as well as in the Commercial.<sup>363</sup>

<sup>360</sup> This is also in the Red Book and the White Book; also in 39 SOLICITORS' JOURNAL, 245 (February 9, 1895).

<sup>361</sup> The history and practice of the Commercial "Court" are fully described in "Practice of the Commercial Court" (London, 1902) by Mr. Theobald Mathew, a son of the late Lord Justice Mathew, who was the first judge to take the List and who established the precedents for its efficiency.

<sup>362</sup> In 1912 (the last year for which figures are available) there were altogether three hundred and fifty-eight summonses for directions in the Commercial List, out of a total of sixty thousand eight hundred and twenty-six proceedings of all kinds begun in the King's Bench Division—about one-half

Nor has it had the effect of winning back to the Law Courts disputes that were going to arbitration. The number of arbitrations is considered by competent authorities to be as large as ever. Sir John Macdonell, the King's Remembrancer, in the Civil Judicial Statistics for 1912, speaks of "the large and probably increasing amount of disputes which are determined by arbitration. Many trades," he says, "have completely organized systems of arbitration for the settlement of disputes relative to quantity and quality of goods and as to the performance generally of mercantile contracts." And again, "It is more and more the practice to introduce an arbitration clause into contracts, with the result that disputes are determined outside the Courts." It must not be overlooked, however, that the Commercial List does provide a forum where those who choose can obtain a speedy judicial decision upon differences arising out of contracts such as those for insurance or for carriage by sea—perhaps the two greatest business activities in England.

Soon after the publication of the Rules of 1893, Lord Herschell turned his attention to the larger problem which had, for the moment, been put aside—the problem of revising and codifying the Judicature Acts and Rules to relieve them of their weaknesses in form. The letters of Mr. Snow had stirred up a good deal of publicity in favor of revision; in October, 1892, the *TIMES* had asserted that revision was an urgent need; and it was generally acknowledged that the Rules were "thickly strewn with pitfalls for the unwary practitioner."<sup>364</sup> Lord Herschell had considered it imperative to introduce the new provisions before attempting revision, and to that end he first completed the work that resulted in the changes of 1893; that much out of the way, he and the Rule Committee returned, early in 1894, to the consideration of ways and means for the task of revision. The

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of one *per cent.*—so it is apparent that it is not phenomenal if one out of eighteen judges can keep the List free of arrears.

<sup>364</sup> In fact, there was complaint from the very start that commercial suitors should get better treatment from a judge than other litigants. "The greater the success of the Commercial Court the more unfair does its existence become towards all suitors who for good or bad reasons are excluded from it."

<sup>37</sup> SOLICITORS' JOURNAL, 4 (November 5, 1892).

result was to appoint Lord Justice Lindley and Mr. Justice Charles (whose place was later taken by Lord Justice Kay) a sub-committee to proceed at once with the actual work of revision, and the two judges began without delay. The profession were delighted to hear that the work was under way, not only for the reasons they had given expression to before, but because the unexampled activity of the Rule Committee during the preceding year had made them weary of amendments and they hoped a thorough revision would give them a respite of several years from further changes.<sup>365</sup> The sub-committee gave a great deal of time to the work, frequently going so far as to suspend the sittings of their branch of the Court of Appeal, but before they had gone very far into the labor of digesting the huge mass of Rules they decided it would be impossible for them to complete the revision unaided and they were authorized to delegate the details of draftsmanship to experts employed for the purpose. Mr. Snow, the editor of the White Book, was put in charge of the actual drafting, associated with him being Mr. Francis A. Stringer, the Head Clerk of the Writ, Appearance and Order Department in the Central Office of the Supreme Court, and Mr. W. Wills.

For over two years, the revisers toiled away at their compilation. In August, 1896, the sub-committee was able to place before the Rule Committee for confirmation a new code of Rules, completely ready for service. When this fact was published, it was generally assumed that the new revision would be adopted as of course, and that the "R. S. C. 1896" would replace the old Rules of 1883. But for some reason the approval of the Rule Committee was withheld. It was at first thought that there was merely a delay about formally signing the new Rules, but gradually it became understood that differences had arisen as to the acceptability of parts of the revision, especially where it departed from strict codification to venture into novelties untried, and that the whole thing would be dropped. It is certainly the case

<sup>365</sup> 39 SOLICITORS' JOURNAL, 5 (November 3, 1894): "It is greatly to be hoped that any such revision will have something of the character of finality about it, and that we shall enjoy a period of rest from the constant changes which bewilder and confuse practitioners."

that the 1896 revision was not conducted under that close personal supervision which Lord Selborne, Lord Coleridge and Sir George Jessel bestowed on the revision of 1883. Lord Herschell went out of office soon after it was begun; Lord Halsbury, when he returned to the Lord Chancellorship in 1895, was not personally interested in the enterprise; and Lord Russell of Killowen was inclined to allow the sub-committee and their advisers a free hand to work out the revision unhampered. At all events, when the revision was completed it was found to contain matters to which the approval of the more influential members of the Rule Committee could not be extended, and although no formal action was taken on the subject and no decision was ever published, the revision never emerged from the Committee's consideration and has never been heard of since. Such was the fate of the only official attempt at revision since 1883.<sup>366</sup>

Before Lord Herschell was removed from the custody of the Great Seal by the General Election of 1895, he succeeded in completing certain statutory reforms affecting the Rule Committee, for which the demand was just as insistent as that for the changes in the Rules themselves. The most important of these was the Rules Publication Act, 1893, which imposed upon the rule-making authority the duty to give due notice in public form to their intention to make new Rules.<sup>367</sup> During the life of the first code of Judicature Rules (1875-1883) there was frequent complaint about the absence of such a requirement; in some cases the Rule Committee actually issued new Rules of which the profession had no knowledge until after the date fixed for their taking effect. After 1883, although the delays in publication were not so marked as before, practitioners had no means of knowing officially that new Rules were in process of incubation. Only after they were actually signed would a notice be published that they were to go into effect at a certain date, usually

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<sup>366</sup> A letter from Mr. Snow to the editor of the *SOLICITORS' JOURNAL* (45 S. J. 97, December 8, 1900) is the only stone that marks its grave. He and his colleagues, he says, "completed the task after two years and eight months very hard work. It was approved by the subcommittee and printed and sent to all the judges. There the matter remains."

<sup>367</sup> 56 & 57 Vict., c. 66.

the beginning of the next sittings of the court. No opportunity was offered for public discussion or for criticism by those likely to be most intimately concerned. In the debate on the 1883 Rules in the House of Commons, Lord Halsbury (then Sir Hardinge Giffard) inveighed eloquently against "this silent and secret mode of altering the law."<sup>368</sup> In the Report of the Law Society's Committee of 1889, protesting against Mr. Justice Kay's new Rule on costs of that year, appears this paragraph:

"These Rules . . . were signed without any previous communication with the profession, and the committee desire that attention should once more be called to the importance, both in the interests of the public and for the convenience of the profession, of a sufficient opportunity being afforded to the representatives of the profession for the consideration *in draft* of any proposed rules."<sup>369</sup>

Thereafter the Council of the Law Society worked unremittingly for recognition by Parliament of this necessity. In February, 1890, the President of the Society announced at the annual meeting "that the Council have prepared a Bill for introduction into Parliament providing that new Rules of the Supreme Court and of the county courts should be published a specified time before they are finally sanctioned, so as to afford opportunity for suggestions," and that Bill, known as the Statutory Rules Procedure Bill, was read for the third time in the House of Commons on August 1, 1891, but got no further. In the following session Sir Albert Kaye Rollit, a prominent member of the Council, again introduced the Bill, and this time, with Lord Herschell's assistance, both Houses gave it approval, and it received the Royal Assent December 21, 1893, as the Rules Publication Act. It applies not only to Rules of the Supreme Court but to all statutory rules made under the sanction of Acts of Parliament—an ever increasing body of legislation—and requires that they shall be published in draft in the Gazette forty days before being finally signed. During that time interested parties may obtain copies of the draft, and the rule-making authority is

<sup>368</sup> Hansard, 3rd ser., vol. 283, col. 151 (August 11, 1883).

<sup>369</sup> 33 SOLICITORS' JOURNAL, 496 (June 1, 1889).

required to consider suggestions or criticisms received upon it. The Act has been of great usefulness, and frequently the Rule Committee of the Supreme Court has, after the first publication of draft rules, withdrawn a draft for alteration in accordance with suggestions received.

Another change effected with Lord Herschell's aid, after five years of agitation by the Law Society, was the addition of three active practitioners as members of the Rule Committee, by the Judicature Act, 1894.<sup>370</sup> That Act added to the Committee the President of the Law Society for the time being (he is an annually elected officer) and two barristers to be chosen by the Lord Chancellor. The argument in favor of the change was well put several years earlier in a legal journal:

"The learned judges who constitute the Rule Committee have often to legislate on matters of which they have no practical knowledge, and are, therefore, liable, not merely to err in alterations made by themselves, but also to have schemes foisted upon them by persons outside their body, as to the practical working of which the Rule Committee have no means of judging."

The practitioners in the Committee were further strengthened in 1909 by the substitution for the President of the Law Society of two solicitors, one from London and one from the country,<sup>371</sup> as it was found that the President's annual term was too short to permit of his becoming familiar with the work. This was also in response to representations from the Law Society, Mr. A. S. Mather of Liverpool having first suggested the change in a paper read at the annual meeting in 1903.<sup>372</sup>

## XI.

From 1897 to the present may properly be called the third period in the life of the code of 1883. Over one hundred and seventy new Rules or amendments have been passed in this interval, but they deal principally with matters of detail. In one

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<sup>370</sup> 57 & 58 Vict., c. 16, s. 4.

<sup>371</sup> 9 Edw. VII, c. 11.

<sup>372</sup> Printed in 47 SOLICITORS' JOURNAL, 837 (October 17, 1903).

respect, however, they have made an alteration in the actual framework of procedure, and that is in further developing the summons for directions. After the Commercial List had been in operation a few months under the skilful guidance of Mr. Justice Mathew, the Rule Committee were satisfied that his arguments for the possibility of eliminating, or at least regulating, the delivery of pleadings had much to be said in their favor, and they considered whether or not it would be feasible to extend some of the methods of the Commercial List to other litigations in the High Court. At the end of April, 1896, Lord Halsbury summoned another Council of all the judges, for the purpose, chiefly, of considering some rearrangement of the circuits, and at that Council a committee was appointed to ascertain "whether the procedure now adopted in commercial cases might be extended or assimilated to other cases." The committee reported several months later in favor of requiring all suitors to apply to a master for leave to deliver pleadings, in something like the way they had to apply to the judge in the Commercial List, and in favor of granting leave to plead only where pleadings would be necessary.

The following Spring, the Rule Committee issued a new Rule 1 of Order XXX,<sup>373</sup> making the summons for directions compulsory in practically all actions in the High Court. In framing the Rule, however, the Committee failed to take into account the influence it would have on all the older provisions in the Rules regulating the delivery of pleadings. Under the new Rule a master alone must decide whether there should be any pleadings at all in an action, and if any, what pleadings; previously, when the summons for directions was optional, it was taken out in only a small proportion of cases, the suitors in all the rest delivering pleadings mutually as of course, guided by the Rules in the pleading Orders. The new Rule, therefore, caused a great deal of confusion, as the pleading Orders were left unchanged. As one commentator said: "It is an overriding provision inserted into the midst of an existing code of pro-

cedure rules, many of which it influences, some of which it practically nullifies."<sup>374</sup> In practical operation, the masters decided to disregard the conflicting passages of the older Rules, and guided themselves exclusively by the terms of the new one. This was the situation for several years, the masters in the meantime collecting notes of all the conflicts in the Rules occasioned by the breadth of the new compulsory summons.

At length, in July, 1902, the Rule Committee put an end to this anomaly by issuing a new set of Rules which swept out from all the pleading Orders the inconsistencies introduced by the change in Order XXX. At the same time they increased the usefulness of the summons for directions by extending it to include applications made *after* judgment in an action, in the course of execution or attack upon the judgment.<sup>375</sup> The 1902 Rules, unlike the provision of 1897, were carefully drawn, and the same critic said "without hesitation, that the changes in procedure made during the year are distinct improvements, clearly thought out, and as clearly embodied in the new Rules."<sup>376</sup>

As the matter now stands, a summons for directions must be taken out at the beginning of practically every suit,<sup>377</sup> so that a master acquires seisin of the action and must be applied to for instructions as to the appropriate steps to be taken by the parties. Unfortunately the summons as administered is not fulfilling the purposes for which it was intended. The intention was that some idea of the nature of the case should be imparted to the master upon the first hearing, so that his order could be moulded to fit the requirements of each particular case. The fact is, however, that the solicitors' clerks who appear before the master when the summons is first heard usually know little or nothing about the case, and the order made is almost always in common form: pleadings by each side in so many days, mutual discovery,

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<sup>374</sup> 41 SOLICITORS' JOURNAL, 857 (October 30, 1897).

<sup>375</sup> They are printed together in 46 SOLICITORS' JOURNAL, 646 (July 19, 1902).

<sup>376</sup> 47 SOLICITORS' JOURNAL, 44 (November 15, 1902).

<sup>377</sup> The exceptions are admiralty actions, actions begun by originating summons, and actions begun by a writ specially indorsed under Order III, Rule 6. In the last case, however, if the application for summary judgment is refused, it is treated as an application for further directions.

trial in London with or without a jury, and "leave to apply." Any really individual treatment of the case is postponed to future applications, when its merits are beginning to develop a little more clearly, and the parties come back to the master under his "leave to apply."<sup>378</sup> One result is that the masters exercise complete control over every step that can be taken. Their leave must be obtained and their decision followed in everything short of the actual trial of issues by the judge in court. To assist practitioners, the King's Bench masters have, like the taxing masters, issued a set of practice regulations, to which they add from time to time, covering many details that are left to their discretion by the R. S. C. These "Practice Masters' Rules," unlike the Practice Notes of the taxing masters, have no statutory authority, as there is no Rule expressly authorizing their formulation.<sup>379</sup>

Another set of Rules issued in 1902, which won the approval and satisfaction of the profession, remodeled the system of taxing costs.<sup>380</sup> They were the result of an investigation conducted in 1901 by a departmental committee whose report has not been made public. They created at the Central Office a new department which took over the business of taxations from the scattered taxing officers in the several Divisions and branches of the court, so that now all taxations are done, irrespective of the nature of the action, by twelve masters among whom the bills are distributed for scrutiny according to a rota. It was made possible for these masters to make uniform the exercise of their discretion by the following addition to their powers:

"The taxing masters shall have power to revise and regulate the practice in regard to taxation of costs, and to the allowance of fees, so as to assimilate the allowances for costs and to secure uniformity upon all taxations as far as may be practicable and expedient."<sup>381</sup>

<sup>378</sup> Testimony to this effect was given by Master T. Willes Chitty and by Lord Justice Phillimore before the recent Royal Commission on Delay in the King's Bench Division. Parl. Pap. Cd. 6762, 1913, questions 282 and 1141.

<sup>379</sup> They are printed in the 1914 White Book, pp. 2341-2363. They are divided into twenty-seven sections, each containing a number of rules.

<sup>380</sup> R. S. C., January, 1902. Signed December 13, 1901. They are printed in 46 SOLICITORS' JOURNAL, 134 (December 21, 1901).

<sup>381</sup> Order LXV, Rule 27 (37).

Under this power the taxing masters issued a set of Practice Notes in Hilary Term, 1902, popularly known as the "Blue Book," which conveyed to the profession welcome instructions in detail as to how they desired matters to be prepared for taxation and also announced what course would be taken by them in allowing or disallowing many items of costs in respect of which the precedents in the various Divisions were not uniform.<sup>382</sup>

To these administrative Rules were added a few new directions affecting the taxations themselves. These are contained in the regulations which make up Rule 27 of Order LXV. A most interesting one of 1902 reads as follows:

"On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same *no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake* or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."<sup>383</sup>

This is now the kernel of the whole Rule. It is the touchstone which the taxing master can apply to every item in a bill of costs.

After 1902 there is nothing of importance in the history of procedure for over a decade. Around 1909 there was a great deal of agitation for the appointment of additional judges to the King's Bench Division. A Royal Commission presided over by Lord Gorell heard evidence on the subject in 1907, and in 1909 a joint select committee of both Houses of Parliament went over the ground again, with the result that in 1910 an Act was passed increasing the membership of the King's Bench Division from sixteen to eighteen judges as a temporary expedient until the arrears in the trial lists were cleared off.<sup>384</sup> The question of

<sup>382</sup> These Notes appear in the 1914 Red Book (the Yearly Practice), p. 2147. Under Order LXV, Rule 18, the distribution of work among the taxing masters is left to be arranged by themselves, and they have issued regulations, which are reproduced in the note to the Rule in the Red Book.

<sup>383</sup> Order LXV, Rule 27 (29).

<sup>384</sup> 10 Edw. VII & 1 Geo. V, c. 12.

arrears in the King's Bench Division has been a popular one for Parliamentary oratory in recent years, although it has required some effort of the imagination to find any serious arrears.

Early in 1913, after the matter had been once more considered by a committee of the Cabinet, it was decided, in order to quiet further discussion, to appoint a Royal Commission to investigate the alleged delays.<sup>385</sup> The Commission heard evidence from January to June; the minutes of this evidence are of especial value, because it went further than merely to scrutinize the organization of the court and the distribution of work among the judges; it covered as well the procedure, with the idea that speed in procedure means absence of arrears, and the testimony published<sup>386</sup> contains many interesting descriptions, by persons in actual authority, of the duties performed by the various officers of the court and the course of proceedings in each of their departments.<sup>387</sup> Several prominent witnesses confined themselves exclusively to procedural matters, and on their testimony the Commission based recommendations which will ultimately bear fruit.<sup>388</sup> The Report was presented November 28, 1913, and there is now a committee of judges considering the recommendations it contains.

(*To be Concluded.*)

*Samuel Rosenbaum.*

*London.*

<sup>385</sup> The Commission was presided over by Viscount St. Aldwyn, and included representatives of the Civil Service, the Bench, the Bar, and the Law. Among the witnesses examined were nearly all the occupants of high judicial office, many judges, quasi-judicial officers, barristers, solicitors, and others.

<sup>386</sup> The Report and Evidence were published as Blue Books: Parl. Pap. Cd. 6761, 6762, 7177, and 7178 (1913).

<sup>387</sup> To mention a few: duties of King's Bench judges described by Lord Justice Phillimore in Questions 1028-1039 and 1176; Chancery judges, by Lord Cozens-Hardy, M. R., in Questions 473 and 492, and by Lord Justice Swinfen-Eady in Questions 1249-1259; King's Bench masters, by Master Chitty, in Questions 274-283; Chancery masters, by Master Fox, in Questions 4819-4820; registrars, by Mr. Registrar Farmer, in Questions 5037-5038.

<sup>388</sup> The suggestions on procedure are tabulated in Appendix 8 to the Report. Cd. 7178, pp. 231-237.